Filed 3/19/09 In re E.B. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re E.B., JR., a Person Coming Under the Juvenile Court Law.	B209001
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.B., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK54085)

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn Martinez, Commissioner. Affirmed.

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Kimberly A. Knill, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

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E.B. (Father) appeals from an order at the permanency planning hearing denying him visitation with his two-year-old son, E.B., Jr. We affirm**.**

FACTS AND PROCEEDINGS BELOW

E..B., Jr., born July 2006, came to the attention of the DCFS in September 2006 when his maternal aunt reported that his mother had been arrested and left the boy in her custody.[1] That same day, Father contacted the DCFS and stated that he was E.B., Jr.'s father and that he was homeless but if he found a place to live he wanted the boy placed with him. At some point between the detention and the jurisdictional hearing Father went to the aunt's home to see E.B., Jr. The aunt would not allow him to visit the boy because he smelled of marijuana.

In October 2006, the court sustained a dependency petition as to E.B., Jr. finding that Father had an unresolved history of drug abuse that rendered him incapable of providing his son with regular care and supervision. Father agreed to a court-ordered case plan in which E.B., Jr. would remain in the care and custody of this aunt and Father would have monitored visits. The court also ordered the DCFS to provide reunification services to Father and that Father complete a drug rehabilitation program, including random drug testing, and program of parent education.

At the 6-month review in April 2007 the DCFS reported that Father had not visited Edward, had not drug tested and had not participated in any drug or parental counseling. The court terminated Father's reunification services. It did not terminate his visitation.

At the 12-month review in November 2007 the DCFS reported that Father's whereabouts were unknown and that he had not visited E.B., Jr. nor contacted the social worker about arranging visits.

The March 2008, report for the 18-month hearing stated that Father was with E.B. Jr.'s mother "when she went to visit the children." The report does not say when this visit occurred, if there was more than one visit, and it did not specify which "children"

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1 E.B., Jr. has remained placed with his aunt throughout these proceedings.

Father visited.[2] The report also noted that at some unspecified time Father went to a DCFS office and "asked what he had to do to visit his child" (presumably E.B., Jr.). The answer to this question is not reported. At the hearing the court terminated the mother's reunification services and set the matter for a permanency planning hearing in June 2008.

Father attended the permanency planning hearing. He admitted that he had not visited E.B., Jr. in 2007 or 2008. Through his counsel he represented to the court that he had contacted his son's aunt and attempted without success to arrange visits with his son. The child's attorney represented to the court that on two occasions in 2006 Father had arrived at the aunt's home at 9:00 or 10:00 p.m. and had not been allowed to see the child. In addition, the aunt scheduled numerous visits between Father and son but Father failed to appear. Father's counsel responded by requesting a contested hearing on visitation at which time Father would produce a log showing that when E.B., Jr. was first detained he contacted the DCFS and the caretaker many times to try to arrange visits but that "[a]t some point . . . he kind of gave up[.]"

The court denied Father's request for a contested hearing on visitation and ordered that Father not have visitation with E.B., Jr. The court noted that E.B., Jr. "will be two years old in a few weeks and he hasn't had any contact with his father for at least a year and a half." As far as the child is concerned, his father "is a stranger." The court concluded by observing that "once family reunification is terminated, the focus shifts to insuring the child has permanency and stability, and I cannot find that it is in his best interest to begin having a visit with a person who is a full stranger to him." The permanency and planning hearing was continued to October 2008 because the parents had not received proper notice and the DCFS had not completed its investigation of the caretaker aunt who desired to adopt E.B., Jr.

Father filed a timely appeal from the order denying visitation.

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[2] Father had seven children as of March 2008. E.B. Jr.'s mother had two other children in the dependency system.

DISCUSSION

Welfare and Institutions Code section 366.21, subdivision (h)[3] states that where, as here, the court sets the matter for a permanency planning hearing "[t]he court shall continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds that visitation would be detrimental to the child." This provision means that "the juvenile court was *required* to permit continued visitation pending the section 366.26 hearing absent a finding visitation would be detrimental to the minors." (*In re David D.* (1994) 28 Cal.App.4th 941, 954; italics in original.)[4]

Neither the DCFS nor E.B., Jr. introduced evidence that Father's visits would cause detriment to the child or that they would not be in his best interest. Indeed the idea to terminate Father's visitation was raised sua sponte by the court.

The DCFS points out that when a case reaches the permanency planning stage, as this one had, the focus is no longer on reuniting the family but on the needs of the child for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Therefore, the agency maintains, anything that would interfere with permanency and stability, such as visitations from a stranger, would be detrimental to the child and not in his best interest. This argument fails for two reasons. First it is just argument. The record contains no evidence that as a general rule visits to a two year old by someone the child has never seen before inevitably interfere with plans for the child's permanency and stability. Indeed, such a conclusive presumption of detriment would be inconsistent with the statutory scheme that presumes the parents' right to visitation will continue through the permanency planning hearing *unless* the court finds in a particular case that visitation would be detrimental to the child.

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3 All statutory references are to the Welfare and Institutions Code.

4 The court stated it was denying Father visitation with E.B., Jr. because it could not find that such visits would be in the child's "best interest." According to section 366.21, however, the test is whether visitation would be "detrimental" to the child. We need not decide if "[t]he two standards are basically two sides of the same coin" (*In re Randalynne G.* (2002) 97 Cal.App.4th 1156, 1169) because the evidence did not support denial of visitation under either standard.

Although the court erred in terminating Father's visitation, the only harm that Father alleges is that the no-visitation order prevents him from "maintain[ing] regular visitation and contact with the child" which is necessary to avoid termination of his parental rights at the future permanency planning hearing. (§ 366.26, subd. (c)(1)(B)(i)) and to establish a change of circumstances under section 388. We find no merit in Father's allegation of harm. The time for establishing consistent visitation and contact with E.B., Jr. has long since passed. At the time the court made its no-visitation order the case had been pending more than 18 months and Father had not visited his son more than once. The child's caretaker relative, his aunt, wanted to adopt him and the preliminary adoption procedures were underway. Had it not been for defects in service of notice of the hearing, the court would have terminated Father's parental rights at the June 2008 hearing. Reunification services had been terminated as to both parents. So far as the record shows, Father had done nothing in 18 months to address his drug addiction or homelessness. Even if the caretaker, E.B., Jr.'s aunt, initially had not cooperated with Father in setting up visitations at her home, Father did not contend that he asked the DCFS for assistance in arranging visitation.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

TUCKER, J.*

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.